No. ___

In the
Supreme Court of the United States

STATE OF NORTH CAROLINA, *et al.*,
Appellants,

v.

SANDRA LITTLE COVINGTON, *et al.*,
Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

JURISDICTIONAL STATEMENT

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March 26, 2018

QUESTIONS PRESENTED

After North Carolina's state districting plan was invalidated as a racial gerrymander, the North Carolina General Assembly repealed the plan and enacted into law a new districting plan (the "2017 Plan"). It is undisputed that the General Assembly did not consider race in designing the 2017 Plan. The district court allowed plaintiffs in the original lawsuit to assert new challenges to the 2017 Plan without amending their complaint, and then found that four districts failed to "cure" the racial gerrymandering violation. The district court also adjudicated state-law challenges—even though no plaintiff resides in any of the districts challenged on state-law grounds—and found that five districts violated state constitutional limits on mid-decade redistricting. Instead of allowing the General Assembly to enact a remedial plan, the court imposed a plan designed by a special master who was explicitly encouraged to consider race.

The questions presented are:

1. Whether the district court had jurisdiction to consider challenges to the 2017 Plan.

2. Whether the district court erred by finding that four districts were racially gerrymandered even though the legislature did not consider race.

3. Whether the district court erred by considering and substantiating a state-law challenge to five districts in which no plaintiff resides.

4. Whether the district court erred by refusing to allow the legislature to enact its own remedial plan.

5. Whether the district court erred by imposing a map that improperly considered race.

PARTIES TO THE PROCEEDING

The following were parties in the court below:

Plaintiffs:

James Edward Alston; Marshall Ansin; Valencia Applewhite; Marvin Cornelous Arrington; Susan Sandler Campbell; Sandra Little Covington; Mark R. Englander; Viola Ryals Figueroa; Jamal Trevon Fox; Dedreana Irene Freeman; Claude Dorsey Harris, III; Channelle Darlene James; Crystal Graham Johnson; Catherine Wilson Kimel; Herman Benthle Lewis, Jr.; David Lee Mann; Cynthia C. Martin; Vanessa Vivian Martin; Marcus Walter Mayo; Latanta Denishia McCrimmon; Catherine Orel Medlock-Walton; Antoinette Dennis Mingo; Rosa H. Mustafa; Bryan Olshan Perlmutter; Julian Charles Pridgen, Sr.; Milo Pyne; Juanita Rogers; Ruth E. Sloane; Mary Evelyn Thomas; Gregory Keith Tucker; John Raymond Verdejo

Defendants:

The State of North Carolina; North Carolina State Board of Elections; Rhonda K. Amoroso, in her official capacity; Philip E. Berger, in his official capacity; Paul J. Foley, in his official capacity; Joshua B. Howard, in his official capacity; Maja Kricker, in her official capacity; David R. Lewis, in his official capacity; Joshua D. Malcolm, in his official capacity; Timothy K. Moore, in his official capacity; Robert A. Rucho, in his official capacity

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INTRODUCTION

After North Carolina's legislative districting plan was invalidated as a racial gerrymander, the General Assembly responded in what should have been the surest way to avoid the same result: It enacted a new districting plan without *any* consideration of race. While the General Assembly's decision to be race-neutral still could have permitted a vote-dilution claim, it should have taken any racial gerrymandering challenge off the table. A racial gerrymander occurs only when the legislature's predominant motive is race—and needless to say, a legislature that expressly refuses to take race into account cannot be predominantly motivated by race. The three-judge court quite remarkably held otherwise. Even though the General Assembly did not consider race at all in enacting the 2017 Plan, the court invalidated that plan as a racial gerrymander all the same—not because the legislature's predominant motive was race, but on the novel theory that the legislature failed to adequately remedy the "effects" of the prior racial gerrymandering violation.

That ruling is unprecedented. This Court has never endorsed a test for racial gerrymandering that looks only to the *effects* of a districting plan; to the contrary, this Court has repeatedly emphasized that racial gerrymandering (unlike vote dilution) is an *intent*-based claim. The fact that the three-judge court invalidated an earlier plan enacted by a different legislature does not change that bedrock principle. The question for the court should have been whether the 2017 General Assembly was predominantly motivated by race when enacting the 2017 Plan—and

everyone agrees that it was not. But the district court never even inquired into the legislature's intent. Instead, the court invented a brand-new racial gerrymandering cause of action for second-round plans, under which a legislature that does not consider race at all can still have its plan invalidated if its non-racial criteria produce a map that in some ways resembles a prior map drawn with an illicit motive. In other words, the court concluded that to "cure" a past racial gerrymander, a legislature must take race into account to ensure that its non-racial districting criteria do not produce a map that looks insufficiently different from a prior map. Indeed, the court ultimately purported to "remedy" the racial gerrymandering violation by imposing its own map *that expressly considered race*.

The finding of racial gerrymandering in a map drawn without consideration of race is just the tip of the iceberg when it comes to the flaws in the decision below. The court lacked jurisdiction to consider *any* challenges to the 2017 Plan, as plaintiffs refused to amend their complaint to challenge that new legislation after the 2011 Plan was repealed. To make matters worse, the three-judge court allowed plaintiffs to expand their case to bring state-law challenges that are jurisdictionally invalid three times over: Not only is there no properly pleaded claim challenging the districts attacked on state-law grounds, but no plaintiff even lives in those districts, and federal courts have no power to enjoin state districts on state-law grounds.

The district court's remedial order was just as flawed. The court imposed a map drawn by a special

master who was appointed to draw it before the court even found any violations, with the General Assembly expressly taken out of the process based on a misguided and unprecedented rule that legislatures have only one chance to remedy a racial gerrymander. Even setting aside that the General Assembly's first effort remedied the prior racial gerrymander in the most direct way possible—by redrawing the maps without considering race—the district court's one-bite-at-the-apple theory is profoundly misguided and ignores the bedrock rule that redistricting is the duty and responsibility of the State, not of a federal court. And the district court erred even more fundamentally by directing the special master to consider race in developing a substitute for a race-neutral map.

From the moment this Court remanded this case, the three-judge court misunderstood its role, acting as if it had a permanent receivership over North Carolina's redistricting process. But this is not a case in which the legislature was deadlocked and a federal court had no choice but to impose its own districting plan. The General Assembly repealed the defective law and enacted new districting legislation, and that new legislation is a duly enacted state law entitled to take immediate effect, not just one proposed map among many for a federal court to accept or reject, or to replace with an explicitly race-conscious map. The three-judge court's decision to invalidate duly enacted state legislation without enforcing core Article III prerequisites or identifying a federal constitutional violation is indefensible. This Court should note probable jurisdiction and reverse.

OPINION BELOW

The district court's opinion is available at 2018 WL 505109 and reproduced at App.1-101. The court's order appointing a special master is reproduced at App.102-118.

JURISDICTION

While the decision of the three-judge district court should be vacated for lack of jurisdiction, this Court has jurisdiction over this appeal under 28 U.S.C. §1253. The district court issued its judgment on January 21, 2018. Appellants filed their notice of appeal on January 23, 2018. App.119-20.

CONSTITUTIONAL PROVISIONS INVOLVED

The Equal Protection Clause and relevant provisions of the state constitution are reproduced at App.121-122.

STATEMENT OF THE CASE

In 2011, the North Carolina General Assembly enacted a legislative districting plan. Four years later, after the plan had already been used in the 2012 and 2014 elections, plaintiffs filed suit in the U.S. District Court for the Middle District of North Carolina, alleging that 28 districts in the 2011 Plan were unconstitutional racial gerrymanders. *See Covington v. North Carolina*, 316 F.R.D. 117, 124 (M.D.N.C. 2016). Plaintiffs did not assert a vote-dilution claim under Section 2 of the Voting Rights Act ("VRA") or make any allegations based on the effects of the districts on minority voting strength.

The court granted plaintiffs' request for a three-judge district court, *see* 28 U.S.C. §2284, and in August 2016, the three-judge court invalidated the 2011 Plan.

Covington, 316 F.R.D. at 124. The court agreed with plaintiffs that race was the predominant factor in the design of each challenged district, and that the General Assembly's use of race was not "supported by a strong basis in evidence and narrowly tailored to comply with [the VRA]." *Id.* at 176. The court declined to require changes before the 2016 election, but ordered the General Assembly to enact a new districting plan before the next regularly scheduled election in 2018. *Id.* at 176-78. The State appealed to this Court. *See North Carolina v. Covington*, No. 16-649.

Three weeks after the 2016 election, and while the appeal was still pending in this court, the district court entered another remedial order, this time requiring the State to enact a new districting plan by March 15, 2017, and to hold special elections in the fall of 2017 in every modified district. *Covington v. North Carolina*, No. 15-CV-399, 2016 WL 7667298 (M.D.N.C. Nov. 29, 2016). This Court summarily affirmed the district court's original merits ruling, *North Carolina v. Covington*, 137 S. Ct. 2211 (2017), but summarily vacated its later-issued remedial order, *North Carolina v. Covington*, 137 S. Ct. 1624 (2017), explaining that the court failed to undertake the required equitable weighing process, instead "address[ing] the balance of equities in only the most cursory fashion." *Id.* at 1626.

On remand, the district court declined plaintiffs' request to again impose a special election, instead ordering the General Assembly to enact new "districting plans remedying the constitutional deficiencies with the Subject Districts" by September

1, 2017, and to file the newly enacted plan with the court within seven days. Order, ECF 180 at 8. The court ordered the State to file the entire legislative record for the new plan and to provide, "as to any district with a BVAP greater than 50%, the factual basis upon which the General Assembly concluded that the Voting Rights Act obligated it to draw the district at greater than 50% BVAP." *Id.* at 8-9.

The General Assembly complied. On August 28, 2017, the House of Representatives passed HB927, the House redistricting plan, and the Senate passed SB691, the Senate redistricting plan. Each bill was sent to the other chamber, and each chamber passed the other's bill on August 30, 2017. Both bills were ratified the next day, and the 2017 Plan thus officially became the duly enacted law of North Carolina. *See* Notice of Filing, ECF 184 at 1-2.

Appellants notified the court that the 2017 Plan had been enacted and provided all required legislative materials. *See id.* at 1-11. In response to the court's question about districts "with a BVAP greater than 50%," Order, ECF 180 at 9, appellants explained:

> Data regarding race was not used in the drawing of districts for the 2017 House and Senate redistricting plans. No information regarding legally sufficient racially polarized voting was provided to the redistricting committees to justify the use of race in drawing districts.

Notice of Filing, ECF 184 at 10-11.

One week later, without filing an amended complaint or a new lawsuit, plaintiffs filed four sets of "objections" to the 2017 Plan. The first set was the

only one that took issue with any districts that had been challenged and invalidated at previous stages of this litigation—specifically, SD21, SD28, HD21, and HD57. Although plaintiffs acknowledged that the General Assembly did not use any racial data while drawing and enacting the 2017 Plan, Pls.' Objs., ECF 187 at 31, they nonetheless contended that the new versions of those four districts "fail to cure the racial gerrymandering violations." *Id.* at 1.

The rest of plaintiffs' "objections" were brand-new, state-law complaints about districts that had never before been challenged in this litigation. As relevant here, plaintiffs argued that the General Assembly violated the state constitution's prohibition on mid-decade redistricting "by unnecessarily altering ... mid-decade" House Districts 36, 37, 40, 41, and 105. *Id.* at 37 (citing N.C. Const. art. II, §5(4)).

Appellants responded, explaining that "[b]ecause the claims asserted by all plaintiffs are directed at legislation that has now been repealed and replaced"—namely, the 2011 Plan—plaintiffs could no longer demonstrate any harm from that now-defunct plan, "rendering the case moot and divesting this Court of subject matter jurisdiction." Resp. to Pls.' Objs., ECF 192 at 21. Appellants further argued that the district court lacked jurisdiction to consider plaintiffs' state-law challenges. *Id.* at 21-27. And appellants explained that plaintiffs' challenges failed on the merits as well. *Id.* at 28-56.

The court held a hearing on plaintiffs' fully briefed objections on October 12, 2017. Later that day, the court directed the parties "to confer and to submit the names of at least three persons the parties agree are

qualified to serve as a special master," in order to "avoid delay should the Court decide that some or all of plaintiffs' objections should be sustained." Order, ECF 200. One week later, the court informed the parties that it was "concerned" that nine of the challenged districts "either fail to remedy the identified constitutional violation or are otherwise legally unacceptable." Order, ECF 202 at 1-2. But rather than definitively resolve that question, the court confirmed its intention "to appoint a Special Master," "[i]n anticipation of the likely possibility" that it would invalidate the 2017 Plan. *Id.* at 2. The court identified Professor Nathaniel Persily as the Special Master it intended to appoint. *Id.* at 3.

Appellants objected, explaining that before appointing a special master to craft a remedy, the court must first find a violation in need of a remedy. Opp. to Appointment, ECF 204 at 2-6. That rule carries particular force, they explained, in the redistricting context, where the legislature must be given an opportunity to enact a new districting plan when its existing one has been found deficient. *Id.* at 7-8. Because there was still time for the General Assembly to enact a new plan if the 2017 Plan were found deficient, appellants implored the court to definitively resolve that question *before* forcing the State to fund a special master's effort to draw provisional remedial maps. *Id.*

The court overruled appellants' objections, appointed Professor Persily as Special Master, and ordered him to "submit a report and proposed plans" by December 1, 2017. Order, ECF 206 at 5. The court reiterated that it "has serious concerns" that four

districts "fail to remedy the identified constitutional violation" in the 2011 Plan, and that the changes to five other districts "exceeded the authorization to redistrict provided in the Court's previous orders." *Id.* at 1-2. But the court still declined appellants' request to definitively rule on the validity of the 2017 Plan, maintaining that "[t]he State is not entitled to multiple opportunities to remedy its unconstitutional districts." *Id.* at 4.

In the meantime, the court authorized the Special Master to "hire research and technical assistants and advisors" and to "buy any specialized software reasonably necessary," and ordered that all salaries and expenses be paid by the State. *Id.* at 9. The court provided guidelines for the Special Master to follow in drawing his remedial maps. In striking contrast to the race-blind policy choice the General Assembly made, the court informed the Special Master that he "may consider data identifying the race of individuals or voters to the extent necessary to ensure that his plan cures the unconstitutional racial gerrymanders and otherwise complies with federal law." *Id.* at 8-9.

The Special Master filed a "Draft Plan" on November 13, 2017, and after making minor changes in response to plaintiffs' suggestions, issued his final recommended plan and report ("Special Master's Plan") on December 1, 2017. As to the four districts (SD21, SD28, HD21, HD57) that the district court suggested "fail[ed] to remedy" the "impermissible use of race that rendered unconstitutional the 2011 districts," *id.* at 1-2, the Special Master's redrawn versions did not differ significantly from the 2017 Plan in terms of traditional districting criteria. *See* Special

Master's Recommended Plan & Report, ECF 220 at 22-29. But the Special Master's Plan did noticeably differ in one respect: It produced four districts with BVAPs falling into a narrow range of 38.4% to 43.6%, as compared to the 42.3% to 60.8% range in the race-blind 2017 Plan. *Id.* at 22. The Special Master's Plan also restored five House districts (HD36, HD37, HD40, HD41, and HD105) to their 2011 Plan form, on the theory that redrawing those districts violated "the provision of the state constitution that prohibits redistricting more than once per decade." *Id.* at 3. The Special Master also changed 15 adjoining districts to account for his modifications, resulting in a total of 24 districts that differed from the 2017 Plan.

Appellants again objected, Resp. to Special Master's Recommended Plan & Report, ECF 224, and then made a final plea for prompt resolution, imploring the court to move up its hearing and rule on plaintiffs' objections before the General Assembly's next session, Br. in Supp. of Mot. to Expedite, ECF 227 at 1. The district court refused. Order, ECF 228. Almost one month later, on January 5, 2018, the court held a hearing on the Special Master's Plan. Two weeks later, on the very last business day before the Board of Elections had to begin assigning voters to districts for the 2018 elections, the court entered an order invalidating the 2017 Plan and requiring the State to implement the Special Master's Plan for the 2018 elections.

Beginning with the jurisdictional issues, the court ruled that plaintiffs' challenges were not moot because "federal courts *must* review a state's proposed remedial districting plan to ensure it completely

remedies the identified constitutional violation and is not otherwise legally unacceptable." App.26. The court then determined that it was empowered to address not just challenges to districts that were invalidated in the 2011 Plan, but also new, state-law challenges to previously unchallenged districts. App.33-37 The court also rejected the argument that it lacks jurisdiction to consider state-law claims, holding that it could exercise pendent jurisdiction in the interest of "judicial economy, convenience, fairness to the litigants, and comity." App.35.

Turning to the merits, the court invalidated nine districts—some as racial gerrymanders and some as state-law violations. In the first category were SD21, SD28, HD28, and HD57. The court made no finding that the General Assembly acted with an illicit motive in designing those districts—nor could it, given the undisputed fact that the General Assembly did not consider race. Instead, the court held that these four districts "fail to remedy the racial gerrymander that served as the basis for invalidating the 2011 version of those districts." App.37. While the court did not find or conclude that the General Assembly actually considered race, it nonetheless concluded that those districts "fail to completely remedy the constitutional violation" because "the General Assembly's efforts to protect incumbents by preserving district cores and through use of political data perpetuated the unconstitutional effects of the four districts that are the subject of Plaintiffs' racial gerrymandering objections." App.46; *see* App.50-66.

The court next ruled that HD36, HD37, HD40, HD41, and HD105 "violate the [state] constitutional

prohibition on mid-decade redistricting." App.67. While the court acknowledged that the North Carolina Supreme Court "has not addressed the scope of the General Assembly's authority to engage in mid-decade redistricting when a decennial districting plan is found to violate the Constitution or federal law," the court determined that the North Carolina Constitution "prohibits the General Assembly from engaging in mid-decade redistricting." App.67-68. Although the General Assembly had engaged in mid-decade districting only because the district court *invalidated* the duly enacted decennial plan, the court reached the topsy-turvy conclusion that because "a *court* may redraw only those districts necessary to remedy the constitutional violation" when "a court must draw remedial districts *itself*," state legislatures must labor under the same constraints when they are ordered to draw remedial maps. App.69 (emphasis added).

The court then adopted the Special Master's proposed maps in full, including all the reconfigurations of other districts that the Special Master deemed "necessitated" by undoing the General Assembly's purportedly "unnecessary" alterations, and ordered that the 2018 elections take place under the court-imposed plan.

Appellants filed an emergency motion to stay the court's order, *see* Emergency Motion, ECF 243, and filed an emergency stay application in this Court, *North Carolina v. Covington*, No. 17A790. The district court denied a stay, but this Court granted the application in part, staying the order "insofar as it directs the revision of House districts in Wake County

and Mecklenburg County"—*i.e.*, the districts invalidated on state-law grounds.

REASONS FOR SUMMARILY REVERSING OR NOTING PROBABLE JURISDICTION

When a federal court invalidates a districting plan, there are two well-trod paths to devising a replacement map. The preferred path is for the State to enact a new districting plan into law through its ordinary legislative process. If it does so, the new law supersedes the old one and moots the prior dispute; any voter with a constitutional objection to the new plan may challenge it in the same manner as any other state law, such as by filing an amended complaint or a new lawsuit. *See, e.g.*, *Hunt v. Cromartie*, 526 U.S. 541, 544-45 (1999). A different set of rules applies if the State is unable to enact its own remedial plan, because of political "gridlock" or some other factor. In that case, the district court must impose a districting map as a remedial order, and typically does so by choosing among various maps submitted by the parties or proposed by a court-appointed special master, while still using the last legislatively enacted map as a starting point. *See, e.g.*, *Perry v. Perez*, 565 U.S. 388 (2012).

Here, the district court charted an unprecedented and indefensible third course. In compliance with the district court's order, the General Assembly repealed the invalidated plan and enacted the 2017 Plan into law. That new plan was not a mere "proposal" submitted by lawyers, but rather a duly enacted law of North Carolina, entitled to the same deference and presumption of constitutionality accorded to all state legislation. But instead of treating it as such, the

district court treated the 2017 Plan as if it were just a *proposed* remedial plan for violations identified in the earlier litigation that the court was free to accept, modify, reject, or ignore, without regard to the constitutional requirements and substantive standards that would govern a typical challenge to state legislation. In doing so, the court improperly relied on precedents that apply only when the legislature fails to act and the court is forced to take on the "unwelcome obligation" of imposing court-drawn maps. *Connor v. Finch*, 431 U.S. 407, 415 (1977).

The district court's basic misconception of its role lay at the root of its reversible errors. *First*, because the court failed to recognize the 2017 Plan as the duly enacted law of North Carolina, it improperly retained jurisdiction over a moot controversy. Once the General Assembly repealed and replaced the law that plaintiffs challenged in their complaint, the district court lacked power to act unless and until plaintiffs amended their complaint or filed a new one challenging the 2017 Plan (and satisfying the various prerequisites for Article III jurisdiction), which they refused to do.

Second, because the court believed it was "fashioning a remedy" rather than freshly evaluating the constitutionality of a new state law, it invalidated four districts as racial gerrymanders without finding that race was the predominant factor in the 2017 Plan in general or in the invalidated districts in particular. Instead, quite remarkably, the court faulted the General Assembly for *not* considering race, counterintuitively concluding that the legislature's

race-neutral criteria failed to adequately "eliminate the discriminatory effects of the racial gerrymander" that the court found infected the 2011 Plan. Needless to say, a legislature's decision *not* to consider race does not violate the Equal Protection Clause—and thus is no ground for invalidating a duly enacted state law.

Third, the court improperly allowed plaintiffs to expand their claims to include new and novel state-law challenges to five districts that were not challenged in the original complaint. Not only were those claims never properly pleaded, but no plaintiff even lives in those districts, and federal courts have no power to enjoin state districts on state-law claims, especially novel ones. The district court thus lacked jurisdiction over those claims three times over. And in all events, the court's state-law holding rests on a misguided interpretation of the state constitution that has no precedent in state law and puts the state constitution on a collision course with the federal law principle that politically accountable state actors have the predominant role in enacting legislative maps designed to eliminate constitutional problems.

Finally, even if some or all of the district court's merits ruling were to survive, its imposition of the Special Master's Plan still should be reversed. Not only did the district court improperly deprive North Carolina of its sovereign right to draw its own districts; it also inflicted on the State the very race-based districting that the General Assembly chose to eschew. By repeatedly rejecting appellants' pleas to give the General Assembly a chance to draw a new map that remedied whatever problems the court may perceive in the 2017 law, the court committed an

extreme remedial overreach that intruded upon North Carolina's sovereign right to redistrict. And by imposing on the State a remedial plan carefully crafted to achieve a particular racial breakdown, the court effectively forced on the State the very racial gerrymandering that the General Assembly strove to avoid. Thus, at a minimum, the district court's imposition of the Special Master's Plan should be vacated, and the legislature provided an opportunity to correct any constitutional flaws in the 2017 Plan.

In sum, the district court misunderstood its role and the posture of this case. The 2017 Plan is a duly enacted law of North Carolina entitled to the same deference and presumption of constitutionality accorded to all state legislation. The district court did not have the power to subject that legislation to an *ad hoc* "preclearance" process unconstrained by standing, mootness, sovereign immunity, the presumption of good faith, or other bedrock principles of constitutional law. And the district court certainly did not have the power to hold that the General Assembly violated the Equal Protection Clause by following this Court's admonition that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

I. The District Court Lacked Jurisdiction Over Plaintiffs' Challenges To The 2017 Plan.

The first fatal problem with the decision and order below is that the district court lacked jurisdiction to enter them. "A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article

III—when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). Where, as here, a lawsuit challenges the validity of a statute, the controversy ceases to be "live" when the statute is repealed. *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). If a challenged statute no longer exists, then absent unusual circumstances not present here (like actions capable of repetition yet evading review) there is no live controversy over the repealed law and a case challenging only the validity of the repealed statute must be dismissed as moot. *See, e.g.*, *Burke v. Barnes*, 479 U.S. 361, 363-64 (1987); 13C Wright & Miller, *Fed. Prac. & Proc.* §3533.6 (3d ed. 2017) ("Repeal ... moots attacks on a statute.").

That straightforward rule applies equally to redistricting legislation. In *Growe v. Emison*, 507 U.S. 25 (1993), for example, while a federal challenge to a state legislative plan was pending, a state court invalidated that same plan and adopted a new one of its own design. *Id.* at 35. This Court explained that when the "state court's plan became the law of Minnesota," the federal plaintiffs' "claims that the [old] plan violated the Voting Rights Act became moot." *Id.* at 35, 39. At that point, "the federal court was empowered to entertain the [federal] plaintiffs' claims relating to legislative redistricting only to the extent those claims challenged" the new plan. *Id.* at 36. And because plaintiffs had not amended their complaint to challenge that plan, their claims were moot. *Id.*

This Court reiterated the point in *Hunt v. Cromartie*, 526 U.S. 541 (1999). There, the legislature enacted a new districting plan (the 1998 plan) while the district court's order invalidating the prior plan (the 1997 plan) was on appeal to this Court. *Id.* at 546. This Court explained that the legislature's action normally would have mooted the challenge to the 1997 plan, but that the controversy remained live because "the State's 1998 law provides that the State will revert to the 1997 districting plan upon a favorable decision of this Court." *Id.* at 545 n.1. Had the legislature effectuated a non-contingent repeal (as the General Assembly did here), the case would have been moot. *Id.*

Here, plaintiffs' lawsuit challenged only the 2011 Plan, and those claims became moot when the legislature repealed the law creating the 2011 Plan and replaced it with the 2017 Plan. At that point, plaintiffs had two options: They could either amend their complaint to add challenges to the 2017 law or file a new lawsuit challenging it. Plaintiffs did neither. Instead, they pursued their challenges to the 2017 Plan only through "objections" pressed in a so-called remedial proceeding. But that is not an option Article III allows. The 2017 Plan is a duly enacted legislative act that replaces the 2011 Plan, and Article III requires that it be separately challenged via a complaint brought by plaintiffs with standing asserting specific claimed defects with the 2017 law.

The district court did not identify any exception to mootness or otherwise explain why the normal Article III rules would not apply. Instead, it relied on inapposite cases, including two from this Court.

App.25-26. In *Chapman v. Meier*, 420 U.S. 1 (1975), the legislature "failed to reapportion" after the 1970 census, *id.* at 10, and its efforts to enact a plan in 1973 were thwarted by a popular referendum, *id.* at 12. Because the legislature never enacted its own remedial plan into law, the mootness issue never arose. Similarly, in *Reynolds v. Sims*, 377 U.S. 533 (1964), the legislature did not enact any remedial plan for the upcoming 1962 election; it enacted only two provisional reapportionment plans "for the 1966 elections," neither of which took immediate effect. *Id.* at 543. The controversy over what districting plan would govern in 1962 therefore remained very much alive. *See id.* at 586-87.

The district court cited several lower court cases, App.26-27, but none involved the enactment of new districting plans; instead, they involved municipal maps, and remedial plans that the municipality did not enact into any kind of law, but just proposed directly to the court. *See Large v. Fremont Cty.*, 670 F.3d 1133 (10th Cir. 2012); *Williams v. City of Texarkana*, 32 F.3d 1265 (8th Cir. 1994); *McGhee v. Granville Cty.*, 860 F.2d 110 (4th Cir. 1988); *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984).[1] There is a fundamental difference between a proposal to be considered by a court forced to impose its own remedial map and a redistricting map duly enacted

[1] The district court also cited *Harris v. McCrory*, No. 13-cv-949, 2016 WL 3129213 (M.D.N.C. June 2, 2016), but in that case—as in *Hunt*—the new plan was passed only on a contingent basis. The only potentially relevant case the court cited was *United States v. Osceola County*, 474 F. Supp. 2d 1254 (M.D. Fla. 2006), and no party raised the mootness issue there.

through legislation. A duly enacted redistricting map that repeals the earlier statute is a *new law*. Like any other law, it must be challenged in a new lawsuit (or an amended complaint) filed by a plaintiff with standing to challenge the specified aspects of that new legislation as unlawful.

The only conceivable explanation for excusing plaintiffs from having to plead their challenges to the 2017 Plan as new claims is to short-circuit the protections that apply to litigation by traditional methods. And that is precisely what happened here—the district court failed to consider threshold issues like standing, *see infra* Part III, abandoned ordinary rules of discovery and presentation of evidence, *see* Per Curiam Order, ECF 233, and subjected the 2017 Plan to a form of junior-varsity "preclearance" under which the court declared itself empowered to reject the plan without regard to the substantive standards that apply in typical challenges to state legislation, *see infra* Part II. The court's failure to dismiss this case as moot was therefore just part and parcel of the fundamentally flawed manner in which it conducted its entire "remedial" proceeding.

II. The District Court Erred In Concluding That The General Assembly Engaged In Racial Gerrymandering By Declining To Consider Race.

The district court's ruling should also be reversed on the merits, as its conclusion that the General Assembly engaged in racial gerrymandering by declining to consider race is incoherent and unprecedented. Any effort to invalidate duly enacted legislation must begin with the "heavy presumption"

that the law is constitutional and valid. *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 721 (1990). That presumption applies with particular force in the redistricting context, as "reapportionment is primarily the duty and responsibility of the State," *Chapman*, 420 U.S. at 27, and "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions," *Miller v. Johnson*, 515 U.S. 900, 915 (1995).

Racial gerrymandering is an intent-based violation of the Equal Protection Clause. To prevail on a racial gerrymandering claim, a plaintiff must prove that the legislature had a discriminatory intent—*viz.*, that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Id.* at 916. Unlike a vote-dilution claim, which focuses on the *effects* of a districting plan on voting rights, a racial gerrymandering claim focuses on the legislature's *intent*. As this Court recently put it, "the constitutional violation in racial gerrymandering cases *stems from the racial purpose of state action*," and the inevitable "harms that flow from racial sorting." *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 797-98 (2017) (emphasis added). Accordingly, the irreducible minimum of a racial gerrymandering claim is intentional racial sorting. Indeed, that is not just the irreducible minimum; it is the essence of the claim.

Here, there is no dispute that the General Assembly did *not* consider race *at all* when designing the 2017 Plan—not as a predominant motive, a secondary motive, or otherwise. That undisputed fact

should have been the end of the plaintiffs' racial gerrymandering challenges. To state the obvious, a legislature that declines to consider race is not predominantly motivated by race. The district court accepted plaintiffs' challenges nonetheless by asking the wrong question. Rather than ask whether "race was the predominant factor" in the drawing of the challenged districts (as this Court's cases require), it asked instead whether the new districts "eliminate[d] the discriminatory *effects* of the racial gerrymander" that led to the 2011 Plan being invalidated. App.38-39 (emphasis added).

That novel proposition is fundamentally incoherent. Initially, it bears repeating that the court was not reviewing a "proposed remedial districting plan," App.26; it was reviewing a duly enacted state law. The General Assembly responded to the district court's finding that racial motivation infected the 2011 Plan by repealing that plan and replacing it with new, race-neutral districting legislation. Accordingly, the question for the court should have been not whether the 2017 Plan "eliminate[d] the discriminatory effects of the racial gerrymander" in the 2011 Plan, but whether the challenged districts in the new legislation were themselves racially gerrymandered. Yet the district court never even asked—let alone made any findings on—whether "race was the predominant factor" in drawing any of those districts. *Miller*, 515 U.S. at 916.

Instead, the court asked whether the new legislature "eliminated the discriminatory effects" of the *prior* racial gerrymander. But it is the height of incoherence to ask whether the legislature eliminated

the discriminatory *effects* of an *intent*-based violation like racial gerrymandering. It is one thing to ask whether new legislation removes the discriminatory effects of previous legislation that was invalidated for having an improper effect (like in a vote-dilution case), for *effects* may be unwittingly carried over from one version of a law to another. But the only problem with the 2011 Plan that was adjudicated here flowed from the previous legislature's discriminatory *intent*: the stigmatizing "harms that flow from racial sorting." *Bethune-Hill*, 137 S. Ct. at 797. Accordingly, once the legislature enacted a new law with a race-neutral intent, "the discriminatory effects of the racial gerrymander" were, by definition, eliminated, as an individual cannot complain about the stigmatizing injury of being sorted on the basis of race if she was not placed in her district on the basis of race. Discriminatory intent is not indelibly ingrained in statutory text or lines on a map. It is a question of motive that turns on why the legislature enacted the law. If the districts were not drawn on the basis of race (and the court here did not find that they were), then the court had no basis to invalidate them.

In concluding otherwise, the court found fault with the General Assembly's use of certain traditional *non-racial* districting criteria—namely, "preserving district cores and relying on political data" to protect incumbents. App.50. But the court did not find that either of these criteria was used as a pretext or proxy for race. Instead, the court held that these otherwise-permissible criteria are suspect when used to draw a *remedial* map, and that the General Assembly was under an obligation to "ensure that its reliance on those considerations did not serve to perpetuate the

effects of the racial gerrymander." App.50. In other words, the court reached the head-scratching conclusion that to "cure" the past racial gerrymander, the General Assembly cannot ignore race altogether, but instead must examine its non-racial districting criteria to determine what racial impact they would have—*i.e.*, the legislature must once again district on the basis of race.

That is clear from the court's district-by-district analysis of the districts it invalidated, which focused not on whether the General Assembly was motivated by race in drawing those districts, but on whether the General Assembly made affirmative efforts to ensure that each district's BVAP was not "too high," or to move municipalities, precincts, and communities of interest around to ensure that the district's lines did not unintentionally correlate with race. *See, e.g.*, App.50-66. Likewise, when the court instructed the Special Master on how to draw his alternative maps, it specifically instructed that he "may consider data identifying the race of individuals or voters to the extent necessary to ensure that his plan cures the unconstitutional racial gerrymanders." App.111; *see* App.106-18. And the Special Master proceeded to produce new versions of the four challenged districts that all just happened to have BVAPs in a very tight range of 38.4% to 43.6%. *See* Special Master's Recommended Plan & Report, ECF 220 at 22; *cf. Bartlett v. Strickland*, 556 U.S. 1, 13 (2009) (holding that VRA does not require creation of a "crossover" district with 39% BVAP). The district court's protests notwithstanding, *see* App.49-50, there is no other way to understand its opinion than as holding that the

General Assembly engaged in racial gerrymandering by failing to consider race.

To state the obvious, declining to consider race is not a cognizable constitutional violation. And unless the court finds that a particular district actually violates the Constitution, the court has "no basis" to invalidate a district—let alone to replace a race-neutral district with a race-conscious one. *Perry v. Perez*, 565 U.S. 388, 398 (2012); *see also Milliken v. Bradley*, 433 U.S. 267, 282 (1977). By replacing duly enacted districts without finding any constitutional violation, the district court exceeded the scope of any remedial authority it had.[2]

III. The District Court Lacked Jurisdiction Over Plaintiffs' State-Law Challenges And Erred On The Merits.

The district court erred just as egregiously by invalidating five House districts on the theory that the General Assembly violated a state-law prohibition on mid-decade districting. *See* App.66-72 (citing N.C. Const. art. II, §5(4)). That ruling is erroneous for four reasons: There is no properly pleaded claim challenging those districts, no plaintiff even lives in those districts, federal courts have no power to enjoin state districts on state-law grounds, and the district court's novel interpretation of state law is wrong and would put state law on a collision course with federal-

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[2] This Court may wish to hold this case pending its disposition of *Abbott v. Perez*, Nos. 17-586 & 17-626, which presents the same basic question of what a legislature must do to "remedy" a prior finding of intentional discrimination on the basis of race.

law principles minimizing federal-court interference with state elections.

First, the district court never should have adjudicated plaintiffs' state-law challenges because they were wholly outside the scope of plaintiffs' original challenge to the 2011 Plan. They involved entirely different districts and an entirely new (and novel) theory. Indeed plaintiffs' state-law legal theory is, by its very nature, inapplicable to the 2011 Plan. While the district court had no basis to consider *any* challenge to the 2017 Plan absent an amended complaint, *see supra* Part I, whatever conceivable basis the court might have had to retain jurisdiction over challenges to districts that were previously invalidated as racial gerrymanders could not extend to never-before-raised state-law challenges to different districts that could not have been included in the original challenge to the 2011 Plan.

Second, because the original complaint did not include such challenges, it is no surprise (but still a fatal defect) that none of these plaintiffs has standing to bring them. This Court has repeatedly held that individuals do not have standing to challenge districts in which they do not reside. *United States v. Hays*, 515 U.S. 737, 744-45 (1995); *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015). The original complaint included plaintiffs from each of the 28 districts challenged therein, but it quite understandably did not include any plaintiffs from the five districts that plaintiffs challenge only in the context of the 2017 Plan. Yet instead of filing an amended complaint adding new claims and new plaintiffs, the same plaintiffs who live in the 28

originally challenged districts brought these entirely different challenges to entirely different districts. Because plaintiffs do not reside in either the 2011 or the 2017 versions of HD36, HD37, HD40, HD41, or HD105, they are not proper parties "to invoke judicial resolution of the dispute." *Hays*, 515 U.S. at 743.[3]

In opposing appellants' stay application, plaintiffs did not deny that they lack standing. Instead, they made only the implausible argument that there is "no standing issue" because the district court was merely exercising its "independent duty" to assess the legality of the 2017 Plan. Stay.Opp.28 n.6. That argument again confuses judicially imposed districting plans with legislatively enacted ones. While courts forced to impose their *own* plans in the absence of a duly enacted legislative plan obviously have an "independent duty" to ensure those plans do not violate the law, *see Perry*, 565 U.S. at 396, federal courts decidedly do not have any "independent duty" or free-standing power to assess the legality of districting laws (or any other laws) duly enacted by a state legislature. Instead, federal courts are empowered to adjudicate challenges to state laws only if a plaintiff with standing files a lawsuit alleging that the challenged statute is constitutionally infirm. *See, e.g.*, *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947).

This fundamental difference between judicially imposed maps and legislatively enacted maps should

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[3] The districts in which plaintiffs reside are available in North Carolina's online voter registration database. *See Voter Search*, North Carolina State Board of Elections, https://vt.ncsbe.gov/RegLkup.

have been particularly clear given the nature of plaintiffs' state-law claims. Plaintiffs, in essence, claim that the legislature may redistrict only once a decade. Thus, plaintiffs' state-law merits theory critically depends on the 2017 Plan's status as a distinct legislative enactment. But the 2017 Plan's status as a distinct legislative enactment is precisely what makes an amended complaint brought by a plaintiff with standing essential. Plaintiffs' argument ultimately collapses on itself—if they were not challenging the districts that the district court invalidated, then nobody was, and the district court's *ad hoc* review of duly enacted state legislation suffers from Article III problems even more glaring than the standing problem plaintiffs strain to avoid.

Third, this insurmountable standing problem is not even the only insurmountable obstacle to plaintiffs' state-law challenges: The Eleventh Amendment forbids federal courts from enjoining state laws on state-law grounds. As to these five districts, the decision below is based *exclusively* on state law. The court did not hold that these districts (or their predecessor versions) were racially gerrymandered; it held only that the state legislature violated the state constitution by altering these districts mid-decade. But as this Court has squarely held, "a federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when—as here—the relief sought and ordered has an impact directly on the State itself." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 117 (1984). The facts that plaintiffs' *federal* claims were properly in federal court, and that the Fourteenth Amendment abrogates state sovereign immunity as to those federal

claims, does not make any difference, as "neither pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment." *Id.* at 121. The district court therefore lacked jurisdiction to enjoin the State from using the 2017 Plan on state-law grounds.

Finally, the district court's interpretation of state law is simply wrong. The North Carolina Constitution says that districts drawn after a decennial census "shall remain unaltered until the return of another decennial census." N.C. Const. art. II, §5(4); App.122. While that rule is clear enough under ordinary circumstances, the provision does not say anything about the General Assembly's power to redistrict mid-decade when a federal court *invalidates* the State's duly enacted map. Everyone agrees that when that happens, the state constitution allows the General Assembly to alter districts to some extent. Everyone likewise agrees that "[t]he Supreme Court of North Carolina has not addressed the scope of the General Assembly's authority to engage in mid-decade redistricting when a decennial districting plan is found to violate the Constitution or federal law." App.68. At a bare minimum, that uncertainty should have sufficed to persuade the district court to decline to exercise jurisdiction over plaintiffs' novel state-law challenges, as it did with respect to plaintiffs' challenges under another provision of state law. App.72-77.

Instead, the district court crafted a rule that the legislature may not make changes to an invalidated map unless they are "necessary to remedy" whatever infirmity the federal court found. App.69. The court

purported to derive that constraint from this Court's admonitions that *federal courts* should avoid "unnecessarily interfer[ing] with state redistricting choices." App.68 (citing *Upham v. Seamon*, 456 U.S. 37 (1982)). But the fact that a federal court may not "substitute[] its own reapportionment preferences for those of the state legislature," *Upham*, 456 U.S. at 40, hardly compels the conclusion that a federal court may prohibit a state legislature from determining how best to effectuate its legitimate districting choices after a federal court has *invalidated* its existing map. After all, the whole point of cases like *Upham* is that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Chapman*, 420 U.S. at 27. Accordingly, a federal court should not read state law to impose constraints on a legislature's ability to respond to a federal-court order unless state law does so in the absolute clearest of terms, which no one could plausibly claim is the case here.

In short, any state-law challenge must be filed in state court, where state judges familiar with the state constitution can address the unsettled question of how N.C. Const. art. II, §5(4) applies when a federal court invalidates a duly enacted map. Sure enough, after this Court granted a partial stay of the judgment below, a group of plaintiffs represented by the same counsel as plaintiffs here filed exactly that lawsuit in state court. *See* Verified Complaint, *North Carolina State Conf. of NAACP Branches v. Lewis*, Case No. 18CVS002322 (N.C. Super. Ct. Feb. 21, 2018). As that state-court lawsuit underscores, the federal court should not have adjudicated state-law claims asserted by plaintiffs without Article III standing.

IV. The District Court Improperly Prevented The State From Enacting A Remedial Map.

Even if this Court concludes that the district court did not err by invalidating the 2017 Plan, it should still vacate the court's imposition of the Special Master's Plan and allow the General Assembly to enact its own map. The district court repeatedly rejected appellants' pleas for a prompt ruling that would allow the General Assembly to act, instead using a novel one-bite-at-the-remedial-apple rule as an excuse to impose its own districting plan on the State. By doing so, the court intruded upon North Carolina's sovereign right to redistrict, in direct contravention of this Court's precedent.

Decades ago, this Court established a principle of federalism from which it has never wavered: Federal courts must allow States to remedy constitutional infirmities in their districting plans. *Scott v. Germano*, 381 U.S. 407 (1965). If a federal court invalidates a State's districting plan, the State itself must be provided "the opportunity to make its own redistricting decisions so long as that is practically possible and the State chooses to take the opportunity." *Lawyer v. Dep't of Justice*, 521 U.S. 567, 576 (1997). Only when the legislature is unwilling or unable to enact a new map may "a court ... take up the state legislature's task." *Perry*, 565 U.S. at 392.

The district court violated that bedrock rule. The court made crystal clear as early as October that it intended to invalidate the 2017 Plan. In fact, the court was so confident that it "likely" would reach that outcome that it took the "exceptional" step of appointing a special master to draw his own substitute

maps, and even ordered the State to foot the bill for his work. Order, ECF 202. At that point, the only option consistent with this Court's precedents and due respect for state sovereignty was to enter an injunction detailing the specific infirmities in the 2017 Plan. The General Assembly would have had time to enact a new districting plan that remedied those defects and to appeal to this Court on a relatively standard timeline. Indeed, appellants repeatedly implored the court to rule as quickly as possible to ensure that the General Assembly would have time to exercise its sovereign right to remedy any potential violation(s) in time for the 2018 elections. Instead, the district court refused to give the General Assembly a chance to enact a new map.

The court did so on the novel theory that States surrender their sovereign right to redistrict if their first attempt at a remedial map is unsuccessful—no matter how willing the State is to try again. In the district court's view, a State simply "is not entitled to multiple opportunities to remedy its unconstitutional districts." App.106; *see* App.77-78 n.10. The district court purported to divine that rule from this Court's decision in *Reynolds*, but *Reynolds* actually *forecloses* the district court's one-chance-only rule: The *Reynolds* Court invalidated the State's first attempt to draw remedial maps, yet made clear that the district court could intervene in future elections only if the "Legislature fail[s] to enact a constitutionally valid, permanent apportionment scheme." *Reynolds*, 377 U.S. at 587.

The district court's interference with the legislature's right to remedy any perceived problems

with the 2017 Plan also contravened this Court's guidance in *Growe*. There, parallel actions challenging Minnesota's congressional districts were filed in state and federal court, and Minnesota quickly conceded that the districts were unconstitutional. Although the State was ready and willing to enact a new plan, the federal court disabled it from doing so by enjoining the parties from "attempting to enforce or implement any order of the ... Minnesota Special Redistricting Panel." *Growe*, 507 U.S. at 30. The federal court then imposed a congressional plan designed by special masters. *Id.* at 31. This Court reversed, holding that the district court erred by wresting control of the redistricting process from the State. Reiterating that "the Constitution leaves with the States primary responsibility" for redistricting, this Court held that "a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." *Id.* at 34.

The district court's actions here are virtually indistinguishable. The court was well aware—and did not even dispute—that the General Assembly stood ready and willing to promptly carry out its sovereign duty as soon as the 2017 Plan was invalidated. *See* Opp. to Appointment, ECF 204 at 8. It simply refused to give the General Assembly the opportunity to do so. That refusal is impossible to reconcile with this Court's repeated admonishments that "reapportionment is primarily the duty and responsibility of the State." *Chapman*, 420 U.S. at 27. Indeed, the court's one-bite-at-the-remedial-apple rule smacks of a resurrected version of preclearance, essentially tagging any legislature that fails to

successfully navigate the landmines of redistricting law a permanent "bad actor" that forfeits its sovereign prerogative to redistrict.

V. The District Court Inflicted On The State A Map That Improperly Considered Race In Lieu Of A Race-Neutral Legislative Map.

The district court strayed even further afield in empowering the Special Master to craft, and then imposing on the State, a remedial map that was expressly race-conscious. The General Assembly made a deliberate decision *not* to sort voters on the basis of race, and neither the district court nor the Special Master had the power to override that decision. *See Perry*, 565 U.S. at 394. Indeed, the whole reason the district court invalidated the 2011 Plan is because it concluded that the General Assembly lacked "a strong basis in evidence" to believe that it needed to consider race to draw majority-minority districts to remedy a potential Voting Rights Act violation. *Covington*, 316 F.R.D. at 124. Yet the district court then concluded that the remedy for that unnecessary consideration of race was to replace the General Assembly's new race-blind districts with districts that just so happened to all have BVAPs ranging from 38.4% to 43.6%, Special Master's Recommended Plan & Report, ECF 220 at 22—in other words, to replace race-blind districts with crossover districts. *See Strickland*, 556 U.S. at 13.

That is not even an appropriate remedy for a VRA violation, *id.* at 21; *see also LULAC v. Perry*, 548 U.S. 399, 446 (2006) (opinion of Kennedy, J.), and it is a positively bizarre remedy for a racial gerrymandering violation. Indeed, it is hard to understand the district

court's decision as anything other than an effort to allow plaintiffs to achieve through the back door of a "remedial" proceeding precisely what they could never achieve directly—namely, to compel the State to employ racial quotas of plaintiffs' choosing. Accordingly, even assuming the decision below were right on the merits (and it is not), the court (once again) got the remedy wrong. At a minimum, this Court should correct that remedial overreach and give the General Assembly the right to draw a new constitutionally compliant map.

CONCLUSION

This Court should summarily reverse or note probable jurisdiction.

Respectfully submitted,

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